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SENI JAYA SDN BHD & ANOR v. DATO' HJ AHMAD TERMIZI HJ PUTEH & ANOR

HIGH COURT MALAYA, SHAH ALAM
SEE MEE CHUN J
[CIVIL SUIT NO: MT1-21-259-2007]
B 16 FEBRUARY 2015

CONTRACT: *Terms – Condition – Concession for operation and management of advertising sites – Proposal to local authority – Intention of parties – Inference from language used – Whether agreement existed between parties – Whether agreement*
C *subject to terms and conditions – Whether there was non-compliance of conditions – Whether contract void for illegality*

CONTRACT: *Illegality – Void contract – Concession for operation and management of advertising sites – Proposal to local authority – Application for*
D *temporary occupation licence ('TOL') – Whether illegal to build advertising billboards on state land without TOL – Whether contract void for illegality – National Land Code, ss. 40, 65, 66 & 67*

LAND LAW: *Temporary occupation licence – Application for – Concession for operation and management of advertising sites – Proposal to local authority –*
E *Whether illegal to build advertising billboards on State Land without TOL – National Land Code, ss. 40, 65, 66 & 67*

LOCAL GOVERNMENT: *Licence – Advertising sites – Concession for operation and management of advertising sites – Proposal to local authority – Payment to sports club – Whether sports club vested with rights and powers to carry out local*
F *authority's statutory powers – Whether payment to sports club construed as payment to local authority – Local Government Act 1976, ss. 36(1), 101(t)*

Vide letter dated 14 December 2005, the plaintiffs submitted a proposal to MPPJ in relation to the concession for operation and management of advertising sites in Petaling Jaya ('package A sites'). Reference to MPPJ was
G made on the basis that the events in question occurred before it was made Majlis Bandaraya Petaling Jaya (MBPJ). The proposal stated that the concession was for exclusive rights and MPPJ had to undertake that it would not issue any outdoor advertising licences or approvals to any other parties for sites built on private land or buildings. The consideration for package A
H was payment of license fees, a one off payment of RM320,000 to Kelab Sukan dan Kebudayaan MPPJ ('Sports Club') and an annual payment of RM1.78 million to the Sports Club. *Vide* letter dated 16 December 2005, the first defendant ('D1'), as the president of MPPJ, stated that other than for certain specified sites, MPPJ "... secara prinsipnya bersetuju ..." and
I "... perkara-perkara penting dan utama ..." which was raised in the proposal would be evaluated by MPPJ and further discussed. The plaintiffs then confirmed the acceptance and enclosed the one off payment of RM320,000

and pre-payment of RM1.78 million for the first year. *Vide* letter dated 21 March 2006, D1 informed that MPPJ had approved package A sites. However, the sites were not delivered as per the proposal for non-compliance with certain conditions and as a result, the plaintiffs filed this suit. The issues that arose for consideration were: (i) whether there was an agreement between the parties for the operation and management of the advertising sites; (ii) if there was an agreement, whether the terms had been complied with; and (iii) whether the contract was void for illegality.

Held (dismissing plaintiffs' claim with costs):

(1) An outsider dealing with companies which include a statutory corporation such as MPPJ was not bound to inquire if D1 had the authority to accept the proposal. The contention that the letter dated 16 December 2005 did not bind MPPJ as it was issued on D1's own volition without the approval of MPPJ could not possibly hold as D1 was the president and the highest executive officer. Further, the plaintiffs were not expected to know if the internal procedure had been complied with. (para 5)

(2) The existence of an agreement depends upon the intention of the parties and to be inferred from the language used. On the facts, the language employed in the letter dated 16 December 2005 showed the letter to be an agreement in principle subject to the terms and conditions to be discussed. Whereas, the terms and conditions of the letter dated 21 March 2006 showed that it was a conditional approval or approval in principle. Of the six conditions imposed, three had not been complied with. (paras 7 - 10)

(3) The Sports Club may be established under s. 101(t) of the Local Government Act 1976 ('LGA') but this did not amount to it being vested with the rights and powers to carry out MPPJ's statutory powers. Further, the provision in s. 36(1) of the LGA is intended to cater for situations where the local authority engages a contractor for a fee to carry out functions which were normally carried out by it. This is further evident by s. 37 which prescribes the mode of execution of contracts which involves expenditure by the local authority of more than RM10,000. On the facts, MPPJ was not paying the plaintiffs. Since the Sports Club was not an agent of MPPJ, it follows that any payment to the Sports Club could not be construed as payment to MPPJ. The one off payment and prepayment of the first year payment made to the Sports Club were not received by MPPJ. (paras 12 & 13)

(4) Even if there was a contract, it was void for illegality as it was forbidden by law. The court will not enforce a contract which is expressly prohibited by statute. Even if MPPJ, by custom or practice, did not require the temporary occupation licences ('TOL'), s. 40 read together

with ss. 65 to 67 of the National Land Code would render it illegal for advertising billboards to be built on state land without TOL, which the plaintiffs had failed to apply. (paras 10 & 14)

Case(s) referred to:

Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises Sdn Bhd [1994] 3 CLJ 133 SC ***(foll)***

Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors [1998] 1 CLJ 793 FC ***(refd)***

Royal Bristish Bank v. Turquand [1843-60] All ER Rep 435 ***(refd)***

Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong [1998] 3 CLJ 503 FC ***(refd)***

Legislation referred to:

Local Government Act 1976, ss. 36(1), 37(1), 101(t)

National Land Code, ss. 40, 65, 66, 67

For the plaintiff - Sitpah Selvaratnam (Michael Yap with her); M/s Tommy Thomas

For the 1st defendant - Kamaruzaman M Arif (Chong Phow Yen with him); M/s Kamaruzaman Arif Amran & Chong

Reported by Kumitha Abd Majid

JUDGMENT

See Mee Chun J:

[1] This is plaintiff's claim against D1 the President of Majlis Bandaraya Petaling Jaya and D2 the Majlis Bandaraya Petaling Jaya ('MBPJ'). D1 was not present throughout the court proceedings and neither was he represented by solicitors. The primary issues are whether there was an agreement between MBPJ and plaintiffs for the operation and management of 172 advertising sites in Petaling Jaya (Package A sites) and if there was an agreement whether the terms had been complied with and if it is void for illegality. References to MPPJ are on the basis the events in question occurred before it was made MBPJ.

[2] By letter dated 14 December 2005 (B1 73) plaintiffs submitted a proposal to MPPJ on the concession for operation and management of advertising sites which included Package A. In the proposal (B7 1406-1407) it was stated the concession was for exclusive rights wherein MPPJ was with effect from 1 January 2007 to undertake not to issue any outdoor advertising licences or approvals to any parties for sites built on private land or buildings. The consideration for Package A was payment of licence fees, a one off payment of RM320,000 to Kelab Sukan dan Kebudayaan MPPJ ('sports club') and annual payment to sports club of RM1.78 million. By letter dated 16 December 2005 (B1 74) D1 stated other than for certain specified sites MPPJ "secara prinsipnya bersetuju" and "perkara-perkara penting dan utama" which was raised in the proposal would be evaluated by MPPJ and further discussed. By letter dated 16 December 2005 (B1 75) plaintiffs confirmed acceptance and enclosed the one-off payment of RM320,000 and prepayment of first year of RM1.78 million. By letter dated

21 March 2006 (B1 78) D1 wrote that MPPJ had approved Package A sites. The letter further required compliance of certain conditions of which MPPJ now contends were not complied. As per the proposal the commencement of Package A sites was upon delivery of the sites on or before 1 January 2006 and the sites were not delivered.

[3] Principal witness for plaintiffs on the issue of liability was Andrew Kandappu (PW1, the then General Manager (Finance and Projects) of P1 from 1989 to 2012 and witness statement marked as WSP1). Witnesses for MPPJ on the issue of liability were Zain Azly bin Hj Abdul Rahman (DW1 Deputy Director Jabatan Perancangan Pembangunan and witness statement marked as WSD1), Hjh Sa'diyah bt Khasiman (DW2 Director Treasury Department and witness statement marked as WSD2), Jeyaseelan a/l LT Anthony (councillor and witness statement marked as WSD3) and Norafnie bt Md Ayub (DW4, Assistant District Officer (Land Development) Petaling Land Office).

Whether There Was An Agreement Between MPPJ And Plaintiffs

[4] It is not disputed there was no agreement in writing on the Package A sites between MPPJ and plaintiffs.

[5] The contention that the letter of 16 December 2005 by D1 did not bind MPPJ as it was issued on D1's own volition without the approval of MPPJ cannot possibly hold as D1 was the President and the highest executive officer. It is settled law that an outsider dealing with companies which include a statutory corporation such as MPPJ is not bound to inquire if D1 had authority to accept the proposal. Refer to *Royal British Bank v. Turquand* [1843-60] All ER Rep 435 and *Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors* [1998] 1 CLJ 793; [1998] 1 MLJ 465. In *Pekan Nenas* (*supra*) it was stated at p. 826 (CLJ); p. 505 (MLJ):

> Now, the main plank in the argument advanced by Dr Das for the Purchaser was the rule in *Royal British Bank v. Turquand*, which protects outsiders dealing with a company in good faith who are entitled to assume that acts within its constitution and powers have been properly performed, and are not bound to inquire whether acts of internal management have been regular.
>
> At this point, we would interpolate to observe that the effect of the rule in *Turquand*'s case is that it reduces the enquiries which outsiders having dealings with a company – must make, which, of course promotes business convenience. Such outsiders have no right to insist on proof by the company's directors that the provisions of its memorandum or articles have been complied with, and they cannot therefore be deemed to have constructive notice of some failure to comply which they have no means of discovering (*County of Cloucester Bank v. Rudry Merthyr Steam and House Coal Colliery Co* [1895] 1 Ch 629 at page 636, per Lindley LJ) and it is this which provides the legal basis for the rule.

A And at p. 828 (CLJ); p. 507 (MLJ):

> With respect, these considerations are irrelevant, where, as here, outsiders who believe they have entered into transactions with the company, are not aware if a board meeting is irregular because proper notice of it was not given in advance to each director, since they would not be affected
B by an irregularity if they have no knowledge of it (*Browne v. La Trinandad* (1888) 37 Ch D 1). To put it another way, such an outsider may rely on the rule in *Turquand*'s case which, when it applies, gives rise to an irrebuttable presumption, so that the company concerned is debarred from establishing or relying on the fact that the proceedings were irregular and unauthorized.

C Plaintiffs are not expected to know if the internal procedure had or had not been complied with. The letter of 16 December 2005 speaks for itself.

[6] The submission that plaintiffs ought to have inspected the minutes of meetings wherein there was a comment the proposal amounted to
D privatisation and MPPJ could not sign the agreement was never brought up as evidence.

[7] The letter of 16 December 2005 stated as follows:

> … Pihak MPPJ Jaya secara prinsipnya bersetuju memberi konsesi kepada syarikat tuan di dalam pengurusan dan operasi papan iklan luar di
E kawasan MPPJ kecuali kawasan-kawasan ROW lebuhraya Sprint, LDP, NKVE dan lebuhraya persekutuan dan lain-lain tempat yang dipersetujui oleh kedua-dua pihak.
>
> 2. Perkara-perkara penting dan utama yang dikemukakan oleh pihak tuan di dalam surat tersebut akan diteliti oleh pihak kami dan akan bincangkan
F dengan pihak tuan secepat mungkin.

From the language employed in that letter, the words "secara prinsipnya bersetuju memberi konsesi" and "perkara-perkara penting dan utama … akan diteliti … dan akan dibincangkan" shows the letter to be an agreement in principle subject to terms and conditions to be discussed.

G **[8]** In *Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises Sdn Bhd* [1994] 3 CLJ 133; [1994] 2 MLJ 754 it was held as follows:

> (1) The existence of an agreement depends upon the intention of the parties, who must be *ad idem*. It may be inferred from the language used, the parties' conduct having regard to the surrounding
H circumstances and the object of the contract. The court will generally apply an objective or reasonable man test.
>
> …
>
> (4) On its true construction, the letter did not constitute a contract
I binding in law but was only a record of terms which were agreed as a basis for the negotiations of a contract. It was a letter of intent, ie an expression in writing of a party's present intention to enter into a contract at a future date.

The existence of an agreement thus depends upon the intention of parties and to be inferred from the language used where it was held the letter in question did not constitute a contract but a record of terms which were agreed as a basis for the negotiations of a contract. The same principles apply here in this instant case.

Non-Compliance Of Conditions

[9] The above finding is supported by the terms and conditions of the letter of 21 March 2006 which stated MPPJ had approved Package A sites and para. 3 which required the compliance of syarat-syarat kebenaran of which there were six conditions. That letter states as follows:

i. Mengemukakan Pelan Struktur

Pihak pemohon dikehendaki mengemukakan pelan struktur ke Jabatan Kawalan Bangunan.

ii. Permohonan Lesen Iklan

Pemohon dikehendaki mengemukakan permohonan ke Bahagian Perlesenan, Jabatan Khidmat Pengurusan dan mematuhi semua syarat-syarat lesen untuk kelulusan dan mematuhi syarat-syarat yang ditetapkan oleh Bahagian berkenaan.

iii. Tidak Boleh Mendirikan Paparan Iklan

…

iv. Memaklumkan Kepada Jabatan Landskap Bagi Memotong Atau Dahan Pokok

…

v. Permohonan Lesen Menduduki Sementara (LMS) Ke Pejabat Daerah Petaling

Pihak pemohon dikehendaki mengemukakan permohonan LMS kepada Pejabat Tanah Petaling sebelum mengemukakan Pelan Struktur ke Jabatan Kawalan Bangunan

vi. Menurunkan Papan Iklan Yang Terlibat Menaiktaraf Dan Perlebaran Jalan/Parit

…

The above letter thus shows it was a conditional approval or approval in principle.

[10] Of the above six conditions it was contended three had not been complied with namely submission of structural plans, applications for advertising licence and applications for TOL. The evidence of PW1 was that for existing sites there was no need for structural plans and for 14 sites had been already submitted and for the substituted sites none were submitted as it was awaiting MPPJ's response on the substitution and the requirement applied to new sites. Although PW1 suggested that structural plans were generic it was shown in cross-examination that it could not be so due to

difference in terrain and one structural plan cannot fit all. On the application for advertising licence PW1 stated this was not done as the proposal was the act of applying for the licence. PW1 also stated no TOLs were applied. It was plaintiffs contention no TOLs were required as MPPJ had not been strictly enforcing the requirement. Plaintiffs further referred to a survey done by MPPJ (B1 187-264) where it was recommended sites without structural plans and TOLs could remain provided TOLs be obtained within six months. At best the survey was a recommendation and in any event required a TOL to be eventually obtained. Plaintiffs ought not to put its non-compliance of the conditions at MPPJ's door.

Sports Club Not An Agent Of MPPJ

[11] It was also contended the sports club was an agent of MPPJ in the context of awarding billboard licences to and collecting fees and charges from media operators. This was said to be apparent from the selective implementation of certain terms and conditions in the award to sports club dated 28 April 2002 (B4 897A) and 6 March 2003 (B4 898-901), the letter dated 16 April 2003 from the club to P1 (B1 46) where the club waived licence fees payable by P1 and the fact the requirement of TOL was not imposed on the club. With regard to the waiver there was in fact no such waiver as all that was stated was "menimbangkan untuk merayu pengecualian bayaran lesen daripada MPPJ".

[12] Even if the contention is factually correct the sports club cannot in law be an agent of MPPJ. The sports club may be established under s. 101(t) of Local Government Act 1976 ('LGA') but this does not amount to it being vested with the right and power to carry out MPPJ's statutory powers. Section 36(1) relied on which states a local authority may enter into contracts necessary for the discharge of any of its functions does not apply. This provision is intended to cater for situations where the local authority engages a contractor for a fee to carry out functions normally carried out by it. This is further evident by s. 37 which prescribes the mode of execution of contracts which involves expenditure by the local authority of more than RM10,000. This case concerns plaintiffs paying to MPPJ and not MPPJ paying to plaintiffs. Sections 36(1) and 37(1) LGA provides as follows:

> 36. Contracts
>
> (1) A local authority may enter into contracts necessary for the discharge of any of its functions provided that such contracts do not involve any expenditure in that year in excess of the sums provided in the approved annual estimates for the discharge of such functions unless such expenditure in that year is authorized under section 56.
>
> 37. Mode of executing contracts exceeding ten thousand ringgit,
>
> Every contract which involves the expenditure by the local authority of more than ten thousand ringgit shall specify:
>
> …

[13] As the sports club was not an agent of MPPJ it follows any payment to the sports club cannot be construed as payment to MPPJ. The evidence is clear the one-off payment and prepayment of first year payment totalling RM2.1 million was made to sports club and such payments were not received by MPPJ as stated by DW2.

Contract, If Any, Void For Illegality

[14] Even if there was at all a contract, it is void for illegality as it is forbidden by law. In *Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong* [1998] 3 CLJ 503; [1998] 3 MLJ 151 it was stated the court will not enforce a contract which is expressly prohibited by statute; if the statute prohibits the contract it is unenforceable. Hence even if MPPJ had by custom or practice not required TOLs s. 40 read together with ss. 65 to 67 of the National Land Code would render it illegal for advertising billboards to be built on State land without TOLs. Section 40 vests all State land within the State to the State while ss. 65 to 67 deal with the power of the State to issue TOLs.

Conclusion

[15] Plaintiffs claim against D1 and MBPJ is dismissed with costs.